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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

R.M. INVESTMENT CO.,
d/b/a Trappers Lake Lodge & Resort,
Petitioner,

v.

UNITED STATES FOREST SERVICE, and
DON G. CARROLL, in his official capacity
as White River National Forest Supervisor,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 26, 2008

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QUESTION PRESENTED

Does the concept of mootness grounded in the case or controversy requirement of Art. III of the U.S. Constitution divest a federal court of its properly acquired jurisdiction to consider the Congressional mandate found in the judicial review section of the Administrative Procedure Act to "hold unlawful and set aside" certain government action if, as a result of post-Complaint events, the court's relief "other than money damages" cannot restore the aggrieved party to the status quo ante, but can declare that a government agency committed a legal wrong by depriving the aggrieved party of a Constitional right?

STATEMENT REQUIRED BY SUP. CT. R. 14.1(b)

Petitioner R.M. Investment Co. states that the caption of the case contains the names of all of the parties to the proceeding in the U.S. Court of Appeals for the Tenth Circuit.

Petitioner R.M. Investment Co. further states that it has no parent corporation and that no publically held company owns 10% or more of its stock. See Sup. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

R.M. Investment Co. d/b/a Trappers Lake Lodge & Resort ("Trappers") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit").

OPINION AND ORDERS BELOW

The opinion of the Tenth Circuit dated December 28, 2007, is officially reported at 511 F.3d 1103, and is reproduced as Appendix A, 1a-9a.

The Order Vacating Judgment of the U.S. District Court for the District of Colorado dated September 5, 2006, is unofficially reported at 2006 WL 2560693 and is reproduced as Appendix B, 10a-13a.

The Order Setting Aside Agency Action of the U.S. District Court for the District of Colorado dated October 19, 2005, is not reported. A vacated judgment "deprives that court's opinion of precedential effect." County of Los Angeles v. Davis, 440 U.S. 625, 634, n. 6 (1979). The order is reproduced as Appendix C, 14a-27a.

JURISDICTION IN THIS COURT

The order and judgment of the Tenth Circuit were entered December 28, 2007. Trappers files this Petition for Writ of Certiorari within 90 days of the judgment, which is timely under 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1. This Court possesses jurisdiction under 28 U.S.C. § 1254 to review the Tenth Circuit's order and judgment.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III of the U.S. Constitution and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), which relates to judicial review of agency action, are set out verbatim as Appendix D, 28a-34a.

STATEMENT OF THE CASE

On June 15, 2004, the U.S. Forest Service revoked two Special Use Permits that Trappers needed to operate its remote, recreational resort in Colorado's White River National Forest.

After exhausting its administrative appeals, Trappers invoked the jurisdiction of the U.S. District Court for the District of Colorado under 28 U.S.C. § 1331 and the judicial review section of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("the APA"), asking the court to conduct a judicial review of the lawfulness of the revocation. Trappers sought to have the revocation declared unlawful and set aside due to the Forest Service's failure to give

Trappers advance notice of revocation and opportunity to cure, the due process procedure required by law.

After its thorough judicial review, the district court concluded that the Forest Service's action was unlawful. On October 19, 2005, in its "Order Setting Aside Agency Action," the district court explained that the Forest Service failed to follow its own regulations regarding due process owed a permittee, regulations that required notice of revocation and an opportunity to cure before the revocation became final.

> The Revocation Notice, therefore, was issued without observance of the procedure required by law. Again, if an agency action is found to be "without observance of the procedure required by law," then the court must set aside the action as unlawful. 5 U.S.C. § 706(2)(D). The Forest Service's June 15, 2004, Revocation Notice must be set aside.

Appendix C, 25a. In its specific award of relief, the court stated "[t]hat under 5 U.S.C. §706(2), the June 15, 2004, Notice of Revocation issued by the Forest Service to Trappers (AR 160- 163) is **SET ASIDE**." Appendix C, 26a.

The Forest Service promptly moved to vacate the order and judgment, asserting a mootness defense. The Forest Service argued that, twelve days prior to the order, Trappers completed a sale of its assets to a third party and thereby extinguished its permits and rendered judicial review of the lawfulness of the revocation moot.

The district court accepted the Forest Service's mootness defense. On September 5, 2006, the district court held that the case became moot and its subsequent order and judgment "amounted to nothing more than a declaration that the plaintiff had been wronged by the defendant." Appendix B, 12a. The district court vacated the judgment declaring the government action unlawful and setting aside the revocation and dismissed Trappers' Complaint as moot.

Trappers appealed to the Tenth Circuit, which reviewed de novo the defense of mootness. On December 28, 2007, the Tenth Circuit affirmed the district court. The Tenth Circuit, citing 5 U.S.C. § 702, noted that "[r]elief available under the APA does not include damages." Appendix A, 3a. The Court went on to determine that, under the circumstances, the declaratory relief available to an aggrieved person in the APA was insufficient to meet the case or controversy requirement of Art. III. The Court impliedly found that the government had met its heavy burden of proving mootness and affirmed the district court.

THE TENTH CIRCUIT HELD THAT POST-COMPLAINT EVENTS CAN DIVEST A FEDERAL COURT OF ART. III JURISDICTION TO COMPLETE AN APA JUDICIAL REVIEW OF THE LAWFULNESS OF GOVERNMENT ACTION, AN IMPORTANT ISSUE OF LAW OF FIRST IMPRESSION.

Because federal courts are required in the APA to make a retrospective judicial pronouncement that a government agency deprived a citizen of a Constitutional right, a case seeking judicial review under the APA is no less justiciable under Art. III when, as a result of post-Complaint events, the aggrieved party, if successful, may no longer be restored to the same position it enjoyed prior to the government's action.

A. The Court should look to amendments of the APA for guidance as to Congress' intent that the APA be a mechanism for meaningful judicial review of government action.

The mootness issue presented to this Court in 2008 is similar to the sovereign immunity issue facing Congress back in 1976. Both relate to the government's desire to avoid review of its agency's actions on the merits. However, by asserting these defenses, the government avoids accountability. Congress expressly recognized that accountability is fundamental to our system of government.

> As Government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of Government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law.

H.R. Rep. No. 94-1656, at 10 (1976), (reprinted in 1976 U.S.C.C.A.N. 6121, 6130). The APA provides the framework for safeguarding Constitutional values from deprivations by government agencies, which enjoy a large and unique role in our democracy.

In 1976, Congress revised the APA to create a better mechanism for judicial review of agency action by a person suffering a legal wrong because of the action. Congress partially abolished the defense of governmental sovereign immunity. 5 U.S.C. § 702. Congress acted in response to reports of the federal courts' varying analyses of the sovereign immunity defense in the context of cases for equitable relief.

> It must be recognized at the outset that an effort to establish logical consistency in the decisions dealing with sovereign immunity is bound to be frustrating. The authorities are not reconcilable, and there are conceptual conflicts in the various holdings with which an intermediate appellate court must grapple. Our task is magnified because we have been unable to find any case in which the Supreme Court has sought to reconcile the notion of sovereign immunity with the fundamental concept of the

> APA that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness.

H.R. Rep. No. 94-1646, at 7 (reprinted in 1976 U.S.C.C.A.N. 6121, 6127) citing Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971).

Due to the uncertainty in the case law, and citing its awareness that the government invoked the sovereign immunity defense "in hundreds of cases each year," Congress determined that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." H.R. Rep. No. 94-1646, at 9, (reprinted in 1976 U.S.C.C.A.N. 6121, 6129).

Congress wanted to "force the courts to ask and to answer the right questions." Id. Congress intended to redirect the reviewing court's attention and energy to the merits of claims alleging unlawful government action or inaction:

> The basic issue -- balancing the public interest in preventing undue judicial interference with ongoing governmental programs against the desire to provide judicial review to individuals claiming that Government has harmed or threatens to harm them -- is obscured rather than assisted by the doctrine of sovereign immunity in its present form.

H.R. Rep. No. 94-1646, at 6, (reprinted in 1976 U.S.C.C.A.N. 6121, 6126).

Similarly, in 2008, federal courts analyzing the mootness defense in a case seeking all of the equitable relief available in the judicial review section of the APA have no guidance from this Court as to Constitutional principles. The Tenth Circuit's published opinion, in which the court held that Trappers' claim for judicial review of government action became moot as a result of post-Complaint events, eviscerates the fundamental concept of the APA that persons aggrieved by government action are presumptively entitled to judicial review of the lawfulness of that government action and that government agencies are accountable to the people for their actions.

If the Court allows the Tenth Circuit's opinion to stand as precedent, then the mootness defense will step to the forefront of the government's arsenal of defenses in APA judicial review cases. It will become the mechanism for the government to divert attention from meaningful review on the merits, just like the government used the sovereign immunity defense until Congress stepped in to revise the law in 1976.

B. Principles of mootness are flexible and must be recognized in context, especially in a controversy involving the United States.

The Framers of the Constitution envisioned a balance of powers among the separate but equal branches of government. In the APA, Congress emphasized the essential role of the judicial branch, which would serve as a check on the ever-expanding executive branch.

A finding that a properly initiated APA judicial review claim is no longer justiciable sidesteps government accountability. Article III's case or controversy requirement is perverted if the government successfully invokes the mootness doctrine in this context.

The mootness doctrine is grounded in Art. III of the Constitution. "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States. . .; -- tc Controversies to which the United States shall be a Party. . ." U.S. Const. art. III, § 2. Existence of a "live case or controversy" is a prerequisite to federal court jurisdiction and a requirement at all stages of federal judicial proceedings, not just at the outset of a case, and jurisdiction properly acquired may abate in appropriate cases. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

One essential condition necessary to find that a pending case has become moot is that "it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur." Id. Another essential condition is that interim relief or events have "completely and irrevocably eradicated the effects of the alleged violation." Id. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000). This Court has stated in cases not involving the United States as a party that parties must continue to have a personal stake in the outcome of the case throughout the case. Lewis v. Continental Bank Corp., 494 U.S. 472, 478 (1990).

This Court has recognized the complexity of mootness and the importance of context for proper Art. III analysis:

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant tc the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94-95 (1968). The justiciability doctrine under Art. III is "not a legal concept with a fixed content or susceptible of scientific verification," but rather, it is "one of uncertain and

shifting contours." United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

The Court's analysis of justiciability is not controlled by Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) because that case did not involve the United States as a party and was addressing justiciability in the context of a party's standing, not mootness.

The heavy burden of proving mootness is on the proponent of the doctrine. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 569-70 (1984). In APA judicial review cases, the mootness defense will be asserted only by the government, which seeks to prevent a review of its actions on the merits.

In APA judicial review cases, a court's mindset under Art. III should be to search for reasons to avoid finding a case moot, not reasons to find mootness.

An APA case is a controversy to which the United States is a party. The Tenth Circuit overlooked the judiciary's important assignment by Congress to provide a check on government action, to safeguard Constitutional values, and to ensure that the government is accountable to the people for unlawful government action.

Article III should not be a barrier to judicial review of government action by those citing post-Complaint events and blindly referring to the "relief other than monetary damages" language in 5 U.S.C. § 702. The limitation of equitable relief appears in the very Act

that Congress intended would honor Constitutional separation of powers principles, not narrow them.

C. The purpose and meaning of the APA's limit of equitable relief was not intended to open the door for mootness.

Congress conferred a cause of action for judicial review against the government upon "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The right of judicial review is limited to a person "seeking relief other than money damages." 5 U.S.C. § 702. The exclusion of all remedies other than equitable relief was intentional.

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875 . . . and the Federal Tort Claims Act of 1946. . . . S. 800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment or writ of mandamus. Since S. 800 would be limited only to actions of this type for specific relief, the recovery of money damages contained in the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected.
>
> Courts can make a useful contribution to the administration of Government by reviewing the

> legality of official conduct which adversely affects private persons.

H.R. Rep. No. 94-1646, at 4-5 (1976), (reprinted in 1976 U.S.C.C.A.N. 6121, 6124-6125). However, by narrowing the scope of relief to equitable relief, Congress did not minimize the importance of a public pronouncement that the government deprived a citizen of a Constitutional right.

Under the APA, by Congress' use of the word "shall," a reviewing court is mandated to "hold unlawful and set aside agency action, findings, and conclusions" when they are found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The APA provides assurance that federal agencies cannot deliberately ignore Constitutional rights. The APA does not require that a court be able to award prospective relief to an aggrieved party due to its relation with the government agency. The scope of relief encompasses relief for the past deprivation in the form of retrospective delcaratory relief.

The APA's judicial review section is Congress' recognition of the importance to society that due process rights be scrupulously observed. By mandating that a reviewing court "hold unlawful and set aside" certain agency action, the APA implicitly acknowledges the significant, real world consequences automatically flowing at the very moment of a deprivation of Constitutional rights by the government.

When amending the APA in 1976, Congress expressly recognized several defenses to APA judicial

review cases. Notably, Congress mentioned both standing and ripeness. H.R. Rep. No. 94-1656, at 12, (reprinted in 1976 U.S.C.C.A.N. 6121, 6132). Both standing and ripeness are doctrines also grounded in Art. III, and both require a case or controversy analysis of the facts and circumstances existing at the time a claim for judicial review is filed. Mootness, in contrast, was not specifically mentioned by Congress as a potential defense. Again, the implication is that Congress recognized the real world consequences automatically flowing at the very moment of the government's deprivation of a Constitutional right.

This democracy insists that due process rights be scrupulously observed by the government. The courts below lost sight of the forest among the trees when considering mootness. The Tenth Circuit's opinion did not articulate why the Forest Service met its heavy burden of demonstrating that the justiciability of this case abated as a result of post-Complaint events in a controversy involving alleged deprivation of Constitutional rights by a government agency.

The APA was Trappers' sole avenue for redress against the government. The APA provided only for equitable relief. Neither the APA nor the distressed sale of Trappers' assets would ever fully compensate Trappers for the injurious effects of the Forest Service's past wrongdoing. However, this does not equate with a lack of a case or controversy. Although the permits could no longer be restored as a result of the sale, the district court could (and did) declare the Forest Service's past conduct unlawful. Further, the district court could (and did) award Trappers its costs already incurred and could (and did) consider whether

the Forest Service's position was substantially justified. Even after the sale, judicial review could (and did) have significant meaning and an effect on the real world. The government should be accountable to the people for its actions. Governmental deprivations of due process should be publically pronounced as such.

The mootness defense has the potential to encourage deprivation of rights by a multitude of agencies which may rationalize that the end justifies the means if there is no accountability. For example, valued principles of due process are less likely to be scrupulously followed by a federal agency considering adverse action with respect to a permit or license that it knows will expire within a year. Given the proliferation of federal administrative agencies and their expansive reach, the Court should remove the counterproductive and artificial hurdle to APA judicial review cases created by the Tenth Circuit's mootness analysis.

D. The Court may look to analogous support from civil rights cases where nominal damages serve to vindicate a deprivation of Constitutional rights.

Outside of the APA context, such as in civil rights cases, a claim for nominal damages serves a vital purpose in vindicating deprivations of constitutional rights such as due process. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n. 11 (1986). In Carey v. Piphus, 435 U.S. 247 (1977), the Court considered the appropriate measure of damage for a deprivation of Constitutional rights and recognized that the

purpose of the civil rights statute "would be defeated if injuries caused by the deprivation . . . went uncompensated simply because the common law does not recognize an analogous cause of action." 435 U.S. at 258. In recognition of "the importance to organized society that procedural due process be observed" the Court held that a denial of procedural due process "should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266.

Nominal damages do not equate with a nominal victory. Farrar v. Hobby, 506 U.S. 103, 121 (1992) (O'Connor, J. concurring). In Farrar, the Court stated: "Carey obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process, but cannot prove actual injury." 506 U.S. at 112.

As a result of Congress' limitation on relief available in the APA to relief "other than money damages", Congress did not remove or minimize the presumptive injury-in-fact casused by a government's deprivation of due process. The relief available to an aggrieved person is a retrospective declaration that the government agency acted unlawfully. Such a declaration meets the case or controversy requirement because the United Sates is a party.

The Tenth Circuit expressly rejected Trappers' analogy of the liability for injury-in-fact that attaches at the moment of a Constitutional deprivation under the judicial review section of APA to the liability that attaches for similar conduct in other civil rights statutes.

> The issue in *Utah Animal Rights Coalition* was whether we should continue to recognize the prospect of nominal damages as sufficient to continue a case or controversy that would otherwise be moot. We followed our precedent saying that it would suffice. Rather than saying that nominal damages are irrelevant, we said that they could be dispositive. Take away the nominal damages in that case and no case or controversy remained. Because Trappers has no claim for nominal damages, it cannot rely on nominal-damages cases to overcome mootness.

Appendix A at 6a citing Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1257 (10th Cir. 2004).

In this case, the doctrine of justiciability was misconstrued by the courts below through their unwillingness to acknowledge that the recognized principles of mootness permit flexibility in appropriate cases. This is an appropriate case. The United States is a party alleged to have deprived a citizen of due process.

If the APA permitted Trappers to claim nominal damages of $1.00, which is symbolically representative of the due process it was deprived, then there is no question Trappers' appeal would not be moot and Trappers would be entitled to retrospective declaratory relief that is necessarily intertwined with a court's consideration of whether Trappers is entitled to nominal damages. The APA recognizes that due process rights must be "scrupulously observed" at the same time limiting relief to "other than money

damages." Equitable relief, including a judicial declaration that government action was unlawful and must be set aside upholds the vital purpose of government accountability, even without an award of $1.00. A finding of mootness belittles the significance of the deprivation. In an APA judicial review case, when the court's original jurisdiction is properly acquired at the outset, the case is not mooted by subsequent events because a case or controversy within the meaning of Art. III will still exist.

A conclusion that jurisdiction exists in this APA case would reinforce the balance of powers between the two branches of government and uphold the case or controversy requirement of Art. III. Reinstating the district court's "Order Setting Aside Agency Action" fulfills Congress' desire for government accountability. The Constitution and the APA do not allow the Forest Service or any other government agency to deny due process with impunity.

CONCLUSION

For all of the forgoing reasons, Trappers respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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